COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2406 **Cir. Ct. No. 00-CV-203**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JOEL D. KOCK, A/K/A J.D. KOCK,

PLAINTIFF-APPELLANT,

V.

MINOCQUA COUNTRY CLUB, INC. AND SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J, Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Joel Kock appeals a judgment that he is not entitled to damages because Minocqua Country Club, Inc., did not breach its contract with him. Kock argues that he is entitled to a new trial because: (1) the jury was improperly instructed regarding impossibility, mitigation, abandonment and promissory estoppel; (2) the court should have determined that there was a breach

as a matter of law; and (3) he is entitled to damages as a matter of law. We conclude that the jury was improperly instructed regarding impossibility, mitigation and abandonment. We also conclude that the club breached the contract as a matter of law. We therefore reverse and remand for a new trial on the issue of damages.

BACKGROUND

¶2 In February 1998, Kock received a letter inviting him to interview with the club for the head golf pro position. At the interview, the club's general manager, Mark Benson, discussed the club's plan to build twelve new holes and to remodel the other nine holes into six holes. He stated that nine holes would be open at all times during the construction.

¶3 The club offered Kock the job with a three-year commitment for the 1998-2000 seasons. The initial offer was for $12,000 per year plus 100% of cart rentals. In a letter dated March 10, 1998, Kock made a counterproposal stating:

> In order for me to consider and agree to a three-year deal, two things must occur. The club would have to guarantee that my 1999 base salary would be brought up to date with the current salaries being offered in similar positions in the industry ($20,900). The club would also have to annually provide me with an end of the season stipend of approximately $3,000. … If Minocqua CC can present these terms in a written contract, I would strongly consider signing a three-year agreement. If this scenario is unattainable though, an annually negotiable contract would be the only option that I could consider at this time.

Kock did not, however, mention what his base pay would be in years two and three of a three-year contract. The club countered with a three-year contract with 100% of cart rentals plus other revenues, plus compensation of $16,000, $20,000, and $24,000 respectively for each of the three years.

¶4 Kock accepted the club's counteroffer as an independent contractor and not as a club employee. The contract was never reduced to writing. Kock subsequently entered into a thirty-month lease with Associates Leasing, Inc., for the rental of golf carts. The lease was to cover all three seasons.

¶5 In May 1999, the club contracted to construct the twelve new holes plus a practice range. The original plan was to keep the original nine holes open while the new holes were being constructed. Once the new holes were completed, the old nine holes would be remodeled into six new holes. The club would then have a new eighteen-hole course. The club later discovered that it could save $350,000 if it closed the old nine holes early, rather than leaving them open while the new twelve holes were being completed. If construction of the twelve holes were completed on time, they would be ready for play in the spring of 2000. Remodeling the old nine holes would be completed in the summer of 2000, earlier than if the club waited to remodel them. In August 1999, the club's board, with shareholder approval, decided to close the old nine holes. The holes were closed on September 15, 1999.

¶6 At the time the decision was made to close the old nine holes, delivery was already behind schedule for irrigation pumps necessary for the new construction. The club's general manager testified that by September 6, 1999, the club knew "the equipment was absolutely not going to come in." The club did not change its decision to close the old nine holes, however. Because the new holes were not seeded in the fall of 1999, they were not completed by spring 2000. The old nine holes also remained closed, so no holes were open for play in 2000.

¶7 As a result, Kock surrendered the leased golf carts because there would be no rental fees while the course was closed, and Kock would not be able

to pay the lease obligations. He wrote a memo to the club asking how he would be compensated for his losses.

¶8 The club proposed an employment contract that would convert Kock's status from independent contractor to a club employee for $24,000, terminable on thirty days' notice. Kock's revenue from cart rental fees would be reduced from 100% to 7%. Kock did not agree to the club's proposal. When they could not come to an agreement, the club notified him that it considered that he had resigned.

¶9 Kock brought this action against the club under breach of contract and promissory estoppel theories. A jury trial was held. Over Kock's objections, the jury was instructed on impossibility, mitigation, abandonment, promissory estoppel and rescission. The jury determined there was a three-year agreement between the parties but found no breach and awarded no damages.

¶10 Kock brought three postverdict motions: (1) for judgment notwithstanding the verdict; (2) to change the answers to the special verdict, including a request for damages; and (3) for a new trial. Kock also requested relief based on promissory estoppel. The court denied the motions. Kock now appeals.

DISCUSSION

I. Standards of Review

¶11 A motion for a new trial is addressed to the trial court's discretion, and we will not reverse the trial court's decision unless it failed to rationally apply the proper legal standard to the facts of record. *See* ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996).

¶12 Here, Kock requests a new trial because he claims the jury instructions were erroneous. "A trial court has wide discretion in developing the specific language of jury instructions." ***State v. Foster***, 191 Wis. 2d 14, 26, 528 N.W.2d 22 (Ct. App. 1995). Our review is limited to whether the trial court acted within its discretion and we will reverse only if the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury. *See* ***State v. Randall***, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). However, whether a jury instruction fully and fairly explained the relevant law is a question of law, which this court reviews independently. *See* ***County of Kenosha v. C & S Mgmt.***, 223 Wis. 2d 373, 395, 588 N.W.2d 236 (1999). Further, whether there are suffcient facts to allow an instruction is also a question of law that we review independently. ***State v. Mayhall***, 195 Wis. 2d 53, 57, 535 N.W.2d 473 (Ct. App. 1995).

¶13 Kock also asks us to direct the trial court to change the answers to verdict questions regarding breach of contract and damages. A motion to change the jury's answer to a verdict question challenges the sufficiency of the evidence and may not be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." WIS. STAT. § 805.14(1). This standard applies to both the trial court's consideration of the motion and this court's review on appeal. We review a trial court's decision on a motion challenging the sufficiency of the evidence independently. *See* ***Richards v. Mendivil***, 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996).

II. Jury Instructions

A. Partial Impossibility

¶14 The court gave the standard instruction regarding partial impossibility set out in WIS JI—CIVIL 3063.[1] The club requested this instruction because the irrigation pumps did not arrive on schedule. It argued that this made it partially impossible for the club to perform its contract with Kock by preventing it from keeping nine holes open in 2000. Kock objected to the instruction because he argued the club already knew when it decided to close the old nine holes that the pumps would not be delivered on time. Kock claimed the pump issue was irrelevant as to whether the club breached its contract with Kock because it was foreseeable that the new twelve holes would not be ready to open. Therefore, Kock maintains the partial impossibility instruction was inappropriate because it allowed the jury to incorrectly decide that the club's inability to keep nine holes open was partly due to the late delivery of the pumps.

¶15 We agree with Kock. A party to a contract may only be excused from performance when it cannot do what it promised due to "circumstances beyond his or her control and not within his or her ability to foresee …." *See* WIS JI—CIVIL 3063. The club was aware the pumps did not arrive as scheduled by August 1, and that by September 6 "the equipment was absolutely not going to

[1] WISCONSIN JI—CIVIL 3063 states:

> If a party cannot do part of what the party has promised to do because of circumstances beyond his or her control and not within his or her ability to foresee, but the rest of the performance can be made without material difficulty or disadvantage, then the duty of the promisor to perform may be excused only to the extent of the partial impossibility.

come in." The club could have reversed its decision to close the old nine. Instead, the club proceeded to close the old nine, presumably in order to save $350,000. The club knew that the new twelve holes would not open in 2000 and that closure of the old nine would result in a breach of its contract with Kock. We conclude that the late arrival of the irrigation pumps is therefore not relevant to whether the club breached its contract with Kock. The inability to keep nine holes open for the year 2000 was foreseeable to the club. The decision to keep open or close the original nine holes was wholly within the club's control. The trial court therefore erred by giving the jury an instruction on partial impossibility.

B. Duty to Mitigate

¶16 The court also gave the standard jury instruction regarding mitigation of damages.[2] *See* WIS JI—CIVIL 1731. Based on this instruction, the

[2] WISCONSIN JI—CIVIL 1731 states:

> A person who has been damaged may not recover for losses that he knows or should have known could have been reduced by reasonable efforts. It is not reasonable to expect a person to reduce his damages if it appears that the attempt may cause other serious harm. A person need not take an unreasonable risk, subject himself to unreasonable inconvenience, incur unreasonable expense, disorganize his business, or put himself in a position involving loss of honor and respect.
>
> If you find that a reasonable person would have taken steps to reduce damages and if you find that Joel D. Kock did not take such steps, then you should not include as damages any amount which could have been avoided by him. If a reasonable person would not have taken steps to reduce loss under all of the circumstances existing in this case, then Mr. Kock's failure to so act may not be considered by you in determining his damages.
>
> The burden of proof is upon [the club] to satisfy you to a reasonable certainty by the greater weight of the credible evidence that Mr. Kock should have taken steps to reduce his loss and failed to do so.

club argued Kock failed to mitigate by not accepting the club's new employment offer. Kock requested the court add to the instruction that he "was not obligated to accept compromised sums from [the club] in mitigation of any damages he may have sustained." Initially, the trial court appeared to be amenable to Kock's request. However, after some discussion, the court decided it could not rule as a matter of law that Kock did or did not have the duty to accept the club's offer.

¶17 Kock argues that the jury should have been informed that he was not obligated to accept the club's offer. Kock further maintains that because this was not done, the jury was able to conclude that Kock was required to take the club's employment offer for the 2000 season. We agree.

¶18 Kock cannot be required to mitigate by accepting employment with terms less favorable than the original contract. *See* ***Smith v. Beloit Corp.***, 40 Wis. 2d 550, 559, 162 N.W.2d 585 (1968) (a plaintiff is not obligated to mitigate damages by accepting an offer of re-employment at reduced pay). Here, the original contract was for $24,000 in 2000 plus 100% of rental fees.[3] The club's subsequent offer was for $24,000 and only 7% of cart rental fees. Additionally, the new offer would convert Kock from an independent contractor to an employee terminable on thirty days' notice. Kock was not required to accept the club's new offer, and the club cannot maintain that Kock failed to mitigate by not accepting the offer.

[3] In his memo to the club asking about his compensation due to the closure, Kock estimated his revenue loss from cart rentals and other fees to be approximately $10,000 for the months of September and October 2000.

¶19 We do not mean to suggest that the court should not have given any mitigation instruction at all. Indeed, the mitigation issue is integral to the issue of damages in this case. There are other forms of mitigation that the club might argue the jury should consider in its evaluation of the amount of damages Kock is entitled to, such as whether Kock adequately sought new employment. However, it was erroneous to give an instruction that allowed the jury to determine that Kock was obligated to accept the club's new employment offer and that he failed to mitigate by not accepting it.

C. Abandonment

¶20 The court gave the jury the standard instruction regarding mutual abandonment.[4] WIS JI—CIVIL 3078. Based on this instruction, the club argued that Kock abandoned the contract by failing to negotiate a new contract. Kock objected to this instruction because he argued that failure to settle does not constitute abandonment. At motions after verdict, the court determined the instruction was appropriate because "abandonment can occur by failure to renegotiate material terms in good faith in light of new developments especially where the initial contract called for such flexibility."

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[4] WISCONSIN JI—CIVIL 3078 states:

> Obligations under a contract may be terminated if the contract is abandoned by both the parties. The abandonment of a contract is purely a matter of intent to be ascertained from the facts and circumstances existing at the time the abandonment is alleged to have occurred.
>
> In addition to acts by the parties which would show that an abandonment has occurred, it must appear that there was an actual mutual intention to abandon the contract. Intent to abandon may be express or may be inferred from the conduct of the parties.

¶21 The club argues that the contract was flexible and called for renegotiation of its terms each year. Therefore, because Kock failed to renegotiate, the club contends he abandoned the contract. The jury was instructed that in order for there to be an agreement, there must be a meeting of the minds regarding essential terms and conditions. *See* WIS JI—CIVIL 3010. Additionally, it was instructed that a contract must be definite and certain. *See* WIS JI—CIVIL 3022 (a vague or indefinite agreement is not enforceable as a contract). The jury found there was a three-year contract. Looking at the evidence most favorable to the jury's finding, the jury must have found definite terms, including how Kock was to be compensated. The jury could not have found a three-year contract otherwise.

¶22 After the club's original offer, Kock counteroffered with his letter of March 10, 1998. The club responded with its own counteroffer, which Kock accepted, for a three-year contract with an escalating base pay. The record shows this was not an acceptance of Kock's counteroffer, but a new offer of a three-year contract, which did not require annual renegotiation. This is reflected in the base fee agreement, which was not part of Kock's counteroffer. If the contract were negotiable, there would have been no need to state Kock's base fee for all three years. Because Kock was not required to renegotiate the terms each year, his failure to do so cannot be considered abandonment. Consequently, the court erred by giving the jury the abandonment instruction.

D. Promissory Estoppel

¶23 Finally, Kock argues that the jury should have been instructed regarding promissory estoppel. His basis for requesting the instruction was that the club promised Kock that nine holes would be open at all times during the three

years and told Kock he could rely on that promise. The trial court denied Kock's request.

¶24 We conclude that promissory estoppel does not apply in this case because the jury found there was a contract. Promissory estoppel rests on an equitable theory separate from contract. *See* ***Ferraro v. Koelsch***, 124 Wis. 2d 154, 167-68, 368 N.W.2d 666 (1985); ***Forrer v. Sears, Roebuck & Co.***, 36 Wis. 2d 388, 153 N.W.2d 587 (1967). A promissory estoppel claim only arises when there is no contract. Consequently, promissory estoppel does not apply here because a contract was found to exist.

II. Breach and Damages as a Matter of Law

¶25 Kock argues we should conclude that the club breached the contract as a matter of law. We agree. The club concedes it did not pay Kock for the year 2000. However, the club's defenses against breach are partial impossibility and abandonment. We have determined that these defenses are not applicable. The club has not identified any other possible defenses. As a result, we conclude there was a breach as a matter of law. Question number two of the special verdict asked, "Did Minocqua County [sic] Club breach the contract?" The jury answered "No." We direct the trial court to change the answer to "Yes."

¶26 Kock also argues we should conclude that he is entitled to damages as a matter of law. Kock points us to WIS. STAT. § 805.15(6) for the proposition that we are authorized to award damages as a matter of law. That section states:

> If a *trial court* determines that a verdict is excessive or inadequate, not due to perversity or prejudice or as a result of error during trial (other than an error as to damages), the court shall determine the amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages, unless within 10 days the party to whom the

> option is offered elects to accept judgment in the changed amount. If the option is not accepted, the time period for petitioning the court of appeals for leave to appeal the order for a new trial under ss. 808.03(2) and 809.50 commences on the last day of the option period. (Emphasis added.)

This gives the trial court, not the appellate court, the authority to determine damages as a matter of law.

¶27 However, we would decline to make such a determination even if we were authorized to do so. The trier of fact best determines the issue of damages. As we noted in our discussion of mitigation, the club may yet argue that Kock failed to mitigate his damages. Whether a party failed to mitigate damages is a question of fact. ***Garceau v. Bunnell***, 148 Wis. 2d 146, 155, 434 N.W.2d 794, 797 (Ct. App. 1988). There is also a discrepancy between the parties' experts as to the calculation of Kock's damages. Although Kock states that he would accept the club's expert's calculation, that is for the trier of fact to decide.

III. Conclusion

¶28 The partial impossibility, mitigation, and abandonment instructions were erroneous. These being the club's only defenses to breach, we conclude that the club breached its contract with Kock as a matter of law. We therefore remand for a determination of damages. The jury's verdict that there was a three-year contract remains the law of the case.

By the Court.—Judgment reversed and cause remanded with directions.

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